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7 UNITED STATES BANKRUPTCY COURT
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EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION
9

In re
10 MYLINH T. DANG-ANDRES AND
ANTHONY A. ANDRES,
11 Debtor(s).

Case No. 10-21709
Chapter 7
D.C. No. PD-2

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

14 WELLS FARGO BANK, NA,
15

LBR 4001-1 and 9014-1(f)(1)

16 Movant,
17 vs.

DATE: April 13, 2010
TIME: 9:30 a.m.
CTRM: 35

18 MYLINH T. DANG-ANDRES AND
ANTHONY A. ANDRES, Debtor(s); J.
MICHAEL HOPPER, Chapter 7 Trustee,
19

501 "I" Street
Sacramento, CA 95814

20 Respondents.

21 Wells Fargo Bank, NA ("Movant"), moves this court for an order terminating the automatic
22 stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary
23 to enforce its security interest in real property generally described as 23850 West Tonto Street,
24 Buckeye, Arizona 85326.
25

26 On or about January 26, 2010, Anthony A. Andres ("Borrower") and MyLinh T. Dang-
Andres (collectively, the "Debtors") filed a voluntary petition under Chapter 7 of the Bankruptcy
27 Code, and J. Michael Hopper was appointed as Chapter 7 Trustee. As a result of said filing, certain
28

1 acts and proceedings against Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C.
2 § 362.

3 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).

7 **NO EQUITY**

8
9 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
10 debtor does not have any equity in the property and the property is not necessary to the debtor's
11 effective reorganization.

12 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
13 § 362(d)(2) reflects congressional intent to allow creditors to
immediately proceed against the property where the debtor has no
equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

14
15 Id. at 610 (emphasis added).

16
17 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
18 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
19 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
20 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th
21 Cir. 1984).

22 An appropriate cost of sale factor should also be added to determine if the debtor has any
23 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
24 (Bankr. S.D. Cal. 1982).

25 On or about April 10, 2007, Borrower, for valuable consideration, made, executed and
26 delivered to Movant a Note in the principal sum of \$172,000.00 (the "Note"). Pursuant to the Note,
27 Borrower is obligated to make monthly principal and interest payments commencing June 1, 2007,
28 and continuing until May 1, 2037, when all outstanding amounts are due and payable. The Note

1 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid
2 sums immediately due and payable. A true and correct copy of the Note is attached to the
3 concurrently served and filed Exhibits to the Declaration in Support of Motion for Relief From
4 Automatic Stay ("Exhibits") as exhibit A and incorporated herein by reference.

5 On or about April 10, 2007, the Borrower made, executed and delivered to Movant a Deed of
6 Trust (the "Deed of Trust") granting Movant a security interest in real property commonly described
7 as 23850 West Tonto Street, Buckeye, Arizona 85326 (the "Real Property"), which is more fully
8 described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs incurred as
9 a result of the Debtors' bankruptcy case may be included in the outstanding balance under the Note.
10 The Deed of Trust was recorded on April 13, 2007, in the Official Records of Maricopa County,
11 State of Arizona. A true and correct copy of the Deed of Trust is attached to the Exhibits as
12 exhibit B and incorporated herein by reference.

13 Movant currently owns the Note and is entitled to enforce the provisions of the Note and
14 Deed of Trust.

15 The obligation under the Note is in default as of October 1, 2009, for failure to make
16 payments to Movant. As of February 16, 2010, the total obligation due and owing under the Note is
17 in the approximate amount of \$177,828.62, representing the principal balance of \$171,976.70,
18 interest in the sum of \$5,117.09, accumulated late charges in the amount of \$419.22, escrow
19 advances in the amount of \$255.61, recoverable fees of \$45.00, and other fees due of \$15.00. This is
20 an approximate amount for purposes of this Motion only, and should not be relied upon as such to
21 pay off the subject loan as interest and additional advances may come due subsequent to the filing of
22 the Motion. An exact payoff amount can be obtained by contacting Movant's counsel. Further,
23 Movant has incurred additional post-petition attorneys' fees and costs in bringing the instant Motion.
24 Moreover, the total arrears under the Note are in the approximate sum of \$6,686.28, excluding the
25 post-petition attorneys' fees and costs incurred in filing the instant Motion.

26 As a result of the default under the Note, a Notice of Sale was recorded on January 21, 2010,
27 and the foreclosure sale is scheduled for April 22, 2010.

28

III.

RELIEF FROM STAY

LACK OF EQUITY

Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and Statements, the fair market value of the Property is approximately \$84,500.00. True and correct copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as exhibit C and incorporated herein by reference.

Based on the above, Movant maintains that the equity in the Property is as follows:

9 Fair Market Value: \$84,500.00
10 Less:
11 Movant's Trust Deed \$177,828.62
12 Costs of Sale (8%) \$6,760.00
13 Equity in the Property: <\$100,088.62>

12 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
13 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
14 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

III.

**MOVANT IS ENTITLED TO RELIEF FROM THE
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).**

CAUSE - LACK OF ADEQUATE PROTECTION

19 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
20 protection of its interest in the Property.

21 Movant submits that adequate protection in this case requires normal and periodic cash
22 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
23 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

24 Movant is informed and believes that Debtors are presently unwilling or unable to provide
25 adequate protection to the Movant and there is no probability that adequate protection can be
26 afforded to Movant within a reasonable time.

27 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
28 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

1 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

2 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
3 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

4 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

5 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
6 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
7 the Property;

8 4. Permitting Movant to offer and provide Debtors with information re: a potential
9 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
10 Mitigation Agreement, and to enter into such agreement with Debtors;

11 5. Alternatively, in the event this court declines to grant Movant the relief requested
12 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
13 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
14 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
15 when due (a) the monthly installments of principal and interest, as required under the Note;
16 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
17 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
18 filing of this motion;

19 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
20 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
21 and

22 7. For such other and further relief as the court deems just and proper.

23 Dated: March 12, 2010

PITE DUNCAN, LLP

24 /s/ Anne W. Hamann CA SBN 254327

25 ANNE W. HAMANN

Attorneys for WELLS FARGO BANK, NA